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No. 02-595

DEC 2 CLERK

In the Supreme Court of the United States

UNITED TECHNOLOGIES CORPORATION,
Petitioner,

v.

KATHLEEN DENSBERGER, Individually and as Executrix of the Estate of Colonel William Densberger, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR THE PETITIONER

Despite the arguments plaintiffs advance in their brief in opposition, the issues presented in the petition are properly framed and warrant immediate review.

I. THE QUESTIONS ARE PROPERLY PRESENTED.

Plaintiffs attempt to characterize the case as fact-dependent, contending that there "was evidence" from which the jury "could have found" that Sikorsky did not meet the elements of the government contractor defense as properly understood. Opp. 10-13. But the question here is whether the case was submitted under an improper view of the law – *i.e.*, whether it was error to instruct that Sikorsky was entitled to the defense only if it proved that the government had "prohibited" the warnings that the jury found to be required under state law — a charge that effectively directed a verdict against Sikorsky on the issue. If that charge was erroneous, Sikorsky was deprived of proper consideration of its defense and is entitled to have the case redetermined under a correct view of the law.

The instruction at issue would be reversible error under the Fifth, Sixth and Seventh Circuits' view of the government contractor defense. Plaintiffs do not, and could not, claim that they could have received judgment as a matter of law under the rule prevailing in those Circuits, and in fact Sikorsky offered ample evidence to present a jury question under their interpretation of the defense. Pet. 21-24. Accordingly, the circuit conflict is squarely presented, and any factual disputes are irrelevant to the legal question before this Court.[1]

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[1] Plaintiffs' factual assertions also are misdirected. Their key contention is that Sikorsky "misinformed the Army" by stating that the Blackhawk was "*flyable*" with one full tank and one empty tank. Opp. 4-7. That statement, however, as the jury found when it returned verdicts favorable to Sikorsky on eight of plaintiffs' nine theories, accurately reported the results of the *jettison* testing commissioned by the Army (A471), when the anticipated mission for

Plaintiffs also assert that Sikorsky did not adequately preserve its objections to the faulty jury instructions. First of all, plaintiffs are mistaken. A558. In any case, their quibble is irrelevant here. Sikorsky raised the instructional error before the court of appeals, and the plaintiffs did not claim that it was waived. See Br. for Appellees at 59-60. The court of appeals decided the issue on the merits. Accordingly, the issue is properly before this Court. See, *e.g.*, *Good News Club* v. *Milford Central School*, 533 U.S. 98, 122 n.1 (2001) (Scalia, J., concurring) (by deciding issue on the merits, Court of Appeals indicated that it was preserved); *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of Am.*, 508 U.S. 439, 445-46 (1993).

II. THE SCOPE OF THE GOVERNMENT CONTRACTOR DEFENSE IS IMPORTANT TO THE GOVERNMENT AND TO ALL SUPPLIERS OF MILITARY EQUIPMENT.

Plaintiffs also assert that "this case does not have far ranging policy implications" and that it is not important to define the scope of the government contractor defense in failure-to-warn cases. Opp. 24-25. The filing of *amicus curiae* briefs by several industry groups urging the Court to take this case belies that assertion.

Moreover, in *Boyle* the Solicitor General explained why it is important to have a meaningful government contractor defense as a matter of federal common law, displacing any inconsistent state-law theories of liability. The "availability of the military contractor defense as a matter of federal common law" rests on the principle that the "relationship between the government and its suppliers of ordnance" is "distinctively

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the ESSS did not contemplate *landing* an unbalanced aircraft. That issue arose only after Sikorsky completed the Army-authorized testing, when the Army subsequently decided to use ESSS-equipped Blackhawks to ferry passengers on short hops.

federal in character." Br. for United States as Amicus Curiae, No. 86-492 at 11 ("U.S. *Boyle* Amicus"). In a Supplemental Memorandum, the Solicitor General explained why a federal defense for military contractors must displace state tort law:

> [T]he application to military weapons producers of ordinary state law tort liability rules would discourage those manufacturers from providing necessary assistance in the product design and development process, would undermine military discipline by authorizing the second-guessing of weapons design and procurement decisions, and would increase the manufacturers' uncertainty as to potential liability, thus increasing the costs to the United States as well.

U.S. *Boyle* Amicus Supp. Mem. at 3.

The Solicitor General declared that nothing short of the national defense is involved and added: "Indeed, a more striking conflict between a critically important federal interest and the consequences of otherwise applicable state law cannot be found among the decisions of this Court invoking uniform federal common law rules." *Id.* at 5. He explained that the "procurement process for weapons systems and associated specifically military products proceeds by a long-term cooperative interaction of employees of the military and its contractors * * * ." U.S. *Boyle* Amicus at 6. Therefore, "[w]hether this military contractor defense is available, and what a contractor must prove to establish it, will affect the process by which the military procures weapons systems and the safety and effectiveness of that equipment." *Id.* at 1.

It is more vital than ever that the Court resolve promptly the disarray among the circuits about "what a contractor must prove to establish" the government contractor defense in failure-to-warn cases. The Homeland Security Act of 2002, which was signed into law on November 25, 2002, expressly

provides that "[s]hould a product liability or other lawsuit be filed for claims arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies * * * have been deployed in defense against such act * * * there shall be a rebuttable presumption that the government contractor defense applies in such lawsuit." H.R. 5005, 107th Cong. § 753(d) (2002) (enacted). Congress, however, did not address the elements of the government contractor defense, leaving with this Court the responsibility to continue the development of this doctrine of federal common law. This adds to the need for clear and authoritative guidance, which only this Court can provide, regarding the contours of the defense and the scope of protection contractors can expect as they work with the government to develop products for national security.

III. THE PRESCRIBE/PROSCRIBE RULE POSES A CIRCUIT CONFLICT, ARTIFICIALLY DISTORTS THE PROCUREMENT PROCESS, AND UNDERMINES *BOYLE*.

1. Plaintiffs seek to refute what the circuits themselves acknowledge – that there is a material conflict in their views of the scope of the defense See, *e.g.*, *Oliver* v. *Oshkosh Truck Corp.*, 96 F.3d 992, 1004 n.8 (7th Cir. 1996); *Tate* v. *Boeing Helicopters*, 55 F.3d 1150, 1157 (6th Cir. 1995) (*Tate I*). For example, in *Tate I* the Sixth Circuit, citing the Second Circuit's *Grispo* decision (on which the court below relied), explicitly refused to follow the requirements imposed by "[s]everal of the cases decided in our sister circuits" that the contractor "must show 'that the Government itself dictated the content of the warnings'" or "imposed a 'prohibition'" against the allegedly required warnings. 55 F.3d at 1157 (citations omitted).

Plaintiffs nevertheless assert that the cases are reconcilable on the ground that in *Tate*, *Oliver* and *Kerstetter* the contractors showed "substantive government involvement, knowledge,

decisionmaking and discretion regarding *the relevant warnings* as a matter of law." Opp. 19 (emphasis added). In fact, those decisions specifically ***rejected*** a requirement that the contractor demonstrate that the government focused on the "relevant warnings." Thus, as *Tate II* explained: "A requirement that government review focus on a particular hazard or warning at issue * * * would significantly increase the government contractor's evidentiary burden and would go beyond the requirements of the *Boyle* test." 140 F.3d 654, 658-61 (6th Cir. 1998). See also *Oliver*, 96 F.3d at 1004. Thus, despite plaintiffs' assertions, those circuits do not confine the defense to situations in which the government exercised "discretion" to address the *specific* warning later called into question.

By contrast, in limiting the defense to situations in which the government itself "prescribed" allegedly defective warnings or "proscribed" the suggestion of additional warnings, the Second Circuit and the other circuits that have aligned with it have failed to recognize what the Solicitor General explained in *Boyle* about the military procurement process. Procurement of important weapons systems such as the Blackhawk involves a cooperative and iterative process. The "relationship between the military and its contractors" in the "development of weapons systems" is "complex"; the government sets some requirements "at the outset in detail," while others are "left for formulation during the design process." U.S. *Boyle* Amicus at 9. Because the "development of military products is almost always a joint effort," it is often "difficult to single out either the government or the contractor as the party responsible" for a particular decision. *Id.* at n.7.

In light of the way the procurement process evolves, the Solicitor General in *Boyle* urged the Court to reject the Eleventh Circuit's *Shaw* formulation, as the Court did. Contrary to plaintiffs' assertion (Opp. 21) that the decision below bears no resemblance to *Shaw*, the *Shaw* rule would have

made a defense available only when the contractor merely did what the military directed and refrained from doing anything prohibited. The Solicitor General recommended, by contrast, that the defense be available so long as the government ultimately had exercised discretion about that subject matter. This Court agreed. 487 U.S. 500, 513 (1988).

Using the same analysis, the Fifth, Sixth and Seventh Circuits have held that, in a failure-to-warn case, the defense applies so long as the government exercised discretion with respect to the *subject* of appropriate warnings, even if the government did not "prescribe" all permissible warnings and did not "proscribe" the contractor from suggesting other potential warnings. Those circuits have it right.

2. The Court should take this case in order to reject the effort by the Second Circuit and like-minded courts, in failure-to-warn cases, to engraft additional restrictions onto the test formulated in *Boyle*. Simply because the concern here is safe use rather than safe design is no reason to interpret the *Boyle* test in a way that places additional requirements on the contractor and (as the Fifth, Sixth and Seventh Circuits have found) sharply narrows the scope of the defense. In each situation, the issue under the first *Boyle* prong is the same: Did the government exercise discretion with respect to the subject matter at issue? In *Boyle*, it was the "selection of the appropriate design for military helicopters to be used by our Armed Forces," which was "assuredly a discretionary function" and thus satisfied the first prong of the defense. 487 U.S. at 511. As three circuits have held (Pet. 14-17), the apt parallel when an injured serviceman complains about the sufficiency of warnings is whether the government exercised discretion in deciding what warnings are "appropriate" for its personnel.

The second prong also is the same in both contexts: Did the manufacturer comply with the government's directives on the

matter at issue — here, did the contractor provide whatever warnings the government ultimately decided were appropriate? So, too, the third prong, which is concerned with the extent to which the exercise of government discretion was an informed one, should be the same: Did the contractor *actually* know of latent hazards not known to the government and yet fail to alert the government to the risks?

In addition to the other practical imperatives justifying a meaningful defense for federal contractors, the Solicitor General in *Boyle* explained how disruptive it would be to the military departments if the defense turned on identifying whether the contractor or the military procurement officers were responsible for making the decision on the alleged hazard. Litigation over allocating such culpability between the contractor and the military would have "deleterious consequences * * * on military discipline." U.S. *Boyle* Amicus at 15. That kind of inquiry inevitably would produce finger-pointing and require searching cross-examination of military personnel in order to determine who specifically decided that the allegedly defective warning was adequate.

IV. BOYLE DISPLACES ANY STATE TORT RULE IMPOSING LIABILITY ON DEFENSE CONTRACTORS FOR FAILING TO WARN ABOUT POTENTIAL HAZARDS OF WHICH THEY MERELY "SHOULD HAVE KNOWN."

Plaintiffs contend that *Boyle*'s "requirement of a 'significant conflict' between state law and *the government contract* is absent from this case." Opp. 11-12 (emphasis added). That misstates *Boyle*, which held that there must be a significant conflict between state law and federal *policy*. 487 U.S. at 512. Here, that conflict manifests itself in two respects. First, the government was integrally involved in the process of testing and developing warnings about the Blackhawk/ESSS. Pet. 4-7, 21-23. Imposition of state tort liability on Sikorsky

for failing to conduct additional testing so that it could identify additional risks conflicts with the federal policy reflected in the Army's cost-benefit calculus that balanced safety against mission needs, development time, and costs. See *Tate II*, 140 F.3d at 658.

A second, broader conflict between state law and federal policy is also apparent. The courts below permitted liability to be based upon a negligence theory: that Sikorsky failed to warn about hazards that it *should have perceived*, risks of which a *reasonable manufacturer* would have been aware. Pet. App. 10a. That basis for imposing liability conflicts with the federal policy, articulated in *Boyle* itself, that military contractors should have no liability for failing to warn of risks about which they "should have known," but did not actually know.

The *Shaw* formulation rejected by this Court in *Boyle* would have denied the defense to any contractor who had failed to "warn the military about potential hazards of the design, including hazards *reasonably* known to manufacturers of analogous civilian products." U.S. *Boyle* Amicus at 7 (emphasis added). The Solicitor General explained that the kind of "reasonably should have known" standard often applied under state product liability law to manufacturers of civilian products is not "practical" or desirable in the military procurement setting. *Ibid.* A contractor should lose protection only if it fails to "warn the military about dangers *actually known* to it but not known to the military." U.S. *Boyle* Amicus at 19 (emphasis added). The Court adopted this "actual knowledge" test. See *Boyle*, 487 U.S. at 513. What the Solicitor General said in *Boyle* applies with equal force today:

> [B]y evaluating the conduct of military contractors under a standard of care applicable to manufacturers of consumer products, the *Shaw* version provides an incentive to perform testing and safety evaluation that

> will interfere with the military's interest in obtaining weapons systems quickly and efficiently. * * * [B]y requiring detailed warnings by contractors – and explicit acknowledgments by the military – on almost every conceivable matter, the *Shaw* version is likely to produce a voluminous paper record that will cause delay and perhaps result in the obfuscation of real safety hazards.

U.S. *Boyle* Amicus at 7. This case, in which Sikorsky has been held liable for failing to press the Army to conduct additional testing, illustrates the pertinence of these observations.

More recently, the Court relied on this analysis from *Boyle* to hold that state tort law could not be used to monitor, regulate and penalize the communications between an applicant for FDA approval and the FDA itself. See *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341 (2001). The state law claim there was that the communications during the FDA approval process contained fraudulent misrepresentations. The Court found such state-law claims preempted, explaining that "[p]olicing fraud against federal agencies is hardly 'a field which the States have traditionally occupied' * * * ." 531 U.S. at 347 (citing *Boyle*). The Chief Justice's opinion for a unanimous Court recognized that federal policy reflected a "balance" in the nature of the required communications between applicants and the FDA. Since this balance "can be skewed by allowing fraud-on-the-FDA claims under state tort law," such theories "conflict with, and are therefore impliedly preempted by, federal law." 531 U.S. at 348.

The same reasoning preempts state tort law from being used to "police" the communications between federal contractors and the military by imposing a higher standard of disclosure about warnings the contractor "should have" given. In *Boyle*, the Court agreed with the Solicitor General that the

government's apparent interest in obtaining the maximum warnings about potential hazards must be balanced against the government's competing interest in securing the involvement of contractors willing to participate in the procurement process and ensuring a constructive working relationship between contractor and government. The balance the Court accepted as federal policy is reflected in the third prong of *Boyle*, which requires contractors to warn only of hazards actually *known*, but not those they merely should have perceived.

Just as in *Buckman*, it would frustrate federal policy to allow state tort law to demand more extensive disclosures to the federal government than federal law requires. Complying with a contractor's federal disclosure obligations "in the shadow of 50 States' tort regimes will dramatically increase the potential burdens facing" companies that would otherwise participate in the military procurement process. 531 U.S. at 350. In terms that equally apply to the impact on that process that would flow from allowing state law to superimpose a "should have known" disclosure standard, the Court reasoned (*id.* at 351):

> [F]raud-on-the-FDA claims would also cause applicants to fear that their disclosures to the FDA, although deemed appropriate by the Administration, will later be judged insufficient in state court. Applicants would then have an incentive to submit a deluge of information that the Administration neither wants nor needs, resulting in additional burdens on the FDA's evaluation of an application.

As explained in our petition (at 26, 28-30), the same disruptive consequences would flow if contractors such as Sikorsky are left exposed to massive state-law liabilities for failing to warn the military of potential hazards they "should have" identified and then "should have" brought to the government's attention.

Respectfully submitted.

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